

Kolbo, Delaine

From: Frazier, Kelly
Sent: Monday, December 22, 2003 11:19 AM
To: 'Englerth, Larry -ONE CALL'
Cc: Iverson, Terri; Kolbo, Delaine
Subject: OC03-014 Dismissal

Larry,

Per request from staff, I have looked into the above complaint. Consumer affairs was looking into this and I advised them to tell the person to go to the OCB b/c the complainant was being billed for hitting a wire that he claimed within the corrodore (12 inches) that **does not require a locate ticket (SDCL 49-7A-1(3))**. They filed the complaint and my understanding is that they agreed to have it dismissed b/c they didn't cite any specific violations in their complaint. Upon further scrutiny I have to agree that there is no rule demanding burial to a mandatory depth. I should have considered this problem and I gave Terri some bad advice. The filing was my fault and I take responsibility. Sorry about that guys.

My concern is this: our rules say that a landowner can safely break ground down to 12 inches without making a call. There is strict liability if they go below that depth and hit something. I don't see how a company can bill when their facility is located above that depth. There appears to be an assumption of risk on the part of the company and an **implied obligation** to go below 12 inches. Two questions:

- 1) Perhaps the facility was deep enough at one time, but erosion or compaction caused it to be above the 12 inch line
- 2) How do we really KNOW that the complainant was within that 12 inch "safe" zone?

It seems to me that if a person strictly liable for damage when they dig below 12 inches w/o a ticket, then the homeowner should be considered liability free if they follow our rules and don't go below 12 inches, yet still hit a facility.

There is no rule **requiring** that Qwest put their lines over 12 inches deep, but if their line is hit above 12 inches, I disagree with holding the landowner liable as a matter of policy. Assumption of risk, "statutory waiver" or "implied obligation" should say the facility owner loses the right to bill absent a showing of negligence in violation of SDCL 49-7A-10 or by general negligence standards.

Though the landowner does not appear to have the right to bring a complaint, I feel they do have a defense to the billing. I was curious if the facts you reviewed were consistent with the facts as I understand them. Also, my instinct is to contact the complainant and advise them that they have a defense to the billing irregardless of their rights under the rule. They could refuse to pay on this basis and 1) bring a small claims injunction action against Qwest requesting an Order prohibiting billing or 2) Make Qwest file a complaint against them with the OCB or a small claims court. Any objections to this?

Also, didn't this issue come up once before when a line was beneath an alley that had gotten compacted and brought a gas line up close to the surface? How was that one resolved?

Thanks Larry.

Kelly.